Supreme Court, U. S.
FILED
DEC 5 1978
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-894

PEARL TAYLOR IRVIN, CHARLES WATSON IRVIN, JR. and Wife, MARY S. IRVIN, JOHN LAFAYETTE IRVIN and Wife, NANCY B. IRVIN, DORIS IRVIN EGERTON and Husband, GEORGE G. EGERTON
Petitioners

v.

GREENSBORO-HIGH POINT AIRPORT AUTHORITY
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE NORTH CAROLINA COURT OF APPEALS

J. Sam Johnson, Jr.
Counsel for Petitioners
P. O. Box 3344
Greensboro, North Carolina 27402
(919) 378-9750

Armistead W. Sapp, Jr.
Counsel for Petitioners
219 West Washington Street
Greensboro, North Carolina 27401
(919) 275-7206

INDEX

Authorities Cited.....iii

Opinions Below..... 1

Jurisdiction..... 3

Questions Presented..... 6

Constitutional Provisions and Statutes..... 8

Statement..... 10

Reasons for Granting the Writ..... 20

Conclusion..... 34

Appendix A
Opinion, North Carolina Court of Appeals Filed June 20, 1978..... A-1

Appendix B
Judgment Dismissing Appeal on Motion of Plaintiff and Denying Petition For Discretionary Review, Eighteenth District, Supreme Court of North Carolina Issued September 7, 1978..... B-1

Appendix C
Findings of Fact, Conclusions of Law, and Order, North Carolina, Guilford County,

In the General Court of Justice, Superior Court Division Filed July 7, 1977..... C-1

Appendix D
Pertinent Portions of Constitutional Provisions and Statutes..... D-1

Amendment V to the United States Constitution..... D-1

Amendment VII to the United States Constitution..... D-2

Amendment XIV to the United States Constitution..... D-3

North Carolina Constitution
Article I §19..... D-7
Article I §25..... D-8
Article IV §13..... D-8

28 U.S.C. §1257(3)..... D-10

42 U.S.C. §1982..... D-11

42 U.S.C. §4332(A)(C)..... D-11

49 U.S.C. §1716(c)(3)(4)(d)(e)..... D-14

North Carolina General Statutes
§40-10..... D-19
§40-11..... D-20
§40-12..... D-20
§40-17..... D-23
§40-18..... D-24

AUTHORITIES CITED

CONSTITUTIONS AND STATUTES

United States Constitution
Amendment V..... 8, 10, 21

Amendment VII..... 8, 10, 31

Amendment XIV..... 8, 10, 17, 21

North Carolina Constitution
Article I §19..... 8, 10, 17

Article I §25..... 8, 10

Article IV §13..... 8, 10

28 U.S.C. §1257(3)..... 3, 8

42 U.S.C. §1982..... 4, 8, 33

42 U.S.C. §4332(A)(C)..... 3, 8, 11, 13, 17, 21, 32

49 U.S.C. §1716(c)(3)(4)(d)(e)..... 3, 8, 11, 14, 21, 32

North Carolina General Statutes
Chapter 40..... 32

§40-10..... 9, 11

§40-11..... 9, 11

§40-12..... 9, 11, 23

§40-17..... 9, 11

§40-18..... 9, 11

CASES

Airport Authority v. Irvin,
36 N.C. App. 662, 245
S.E.2d 390 1-2

Airport Authority v. Irvin,
295 N.C. 548, 248
S.E.2d 2

City of Charlotte v. McNeely,
8 N.C. App. 649, 185
S.E.2d 348 (1970) modified
and affirmed 281 N.C. 684,
190 S.E.2d 179 (1972). . . 32

Charlotte v. Heath, 226 N.C.
750, 40 S.E.2d 600 11

Life of the Land v. Brinegar,
C.A.Hawaii 1973, 485

F.2d 460, cert. den.
94 S.Ct. 1979, 416 U.S.
961, 40 L.Ed.2d 312
(1974) 11

State Highway Commission v.
Thornton, 271 N.C. 227,
156 S.E.2d 248 (1967). . . 11

State of Delaware et rel
Sharpe v. 0.62033 Acres
of Land, 110 A.2d 1
(1954) 26

Touhy v. Ragen, 340 U.S. 462
at 470, 71 S.Ct. 416, 95
L.Ed. 417, 423 20

Virginians for Dulles v. Volpe,
344 F.Supp. 573 (1972),
541 F.2d 442 (1976). . . . 11

TEXT

80 ALR3d 1071 . . . . . 5, 26

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978

No.

PEARL TAYLOR IRVIN, CHARLES WATSON IRVIN, JR. and Wife, MARY S. IRVIN, JOHN LAFAYETTE IRVIN and Wife, NANCY B. IRVIN, DORIS IRVIN EGERTON and Husband, GEORGE G. EGERTON
Petitioners

v.

GREENSBORO-HIGH POINT AIRPORT AUTHORITY
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE NORTH CAROLINA COURT OF APPEALS

OPINIONS BELOW

The opinion of the North Carolina Court of Appeals 36 N.C.App. 662, 245

S.E.2d 390, which affirmed the decision of the North Carolina Superior Court for Guilford County permitting Respondent-Airport Authority's condemnation of Petitioners' 90.35 acres a copy of which is appended to this Petition beginning on page A-1. The final Judgment of the Supreme Court of North Carolina 295 N.C. 548, 248 S.E.2d , which dismissed Petitioners' Appeal and denied their Petition for Discretionary Review of the Opinion of the North Carolina Court of Appeals, a copy which is appended to this Petition beginning on page B-1. The Judgment of the Superior Court, affirmed, is appended to this Petition beginning on page C-1.

JURISDICTION

The Judgment of the North Carolina Court of Appeals was made and entered on June 20, 1978 [Rpp. A-1 ff] as affirmed by the final Judgment entered by the Supreme Court of North Carolina on September 7, 1978 [Rp. B-1 ff]. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1257(3). The North Carolina Appellate Courts' decisions questioned the validity of statutes of the United States; the National Environmental Policy Act of 1969, as Amended, 42 U.S.C.A. § 4332(A)(C) and the Airport Act, 49 U.S.C.A. § 1716(c), in failing to hold Respondent was required to hold hearings, make environmental determinations and otherwise comply with these United

States statutes before undertaking major airport construction. Petitioners do not abandon their exceptions on the grounds that such Courts failed to find Petitioners were denied due process and failed to dismiss Respondent's action for condemnation and denied Petitioners' trial by jury as at common law as to the questions of necessity and the conditions precedent; which violated the property rights of Petitioners guaranteed in 42 U.S.C.A. § 1982. The state action of condemnation of Petitioners' property for purported airport purposes without compliance with federal conditions precedent and without present necessity denies Petitioners "the same right" enjoyed by white citizens "in every state and territory" to

hold their real property, cf. 80 ALR3d 1071. In the Findings of Fact, Conclusions of Law and Order of the Superior Court for Guilford County, (affirmed by the North Carolina Court of Appeals) erroneously concluded as a matter of law "IV. No environmental impact statement is required, either under the laws of the United States or of the State of North Carolina, or under any rules or regulations issued in consequence thereof, for petitioner to acquire the tract of land which petitioner is endeavoring to acquire by condemantion in this proceeding." [Rpp 161 ff at page 171; Rp C-28].

QUESTIONS PRESENTED

Did the Courts below deny Petitioners' due process in:

I.

failing to dismiss Respondent's action for condemnation for that Respondent has no present necessity for taking Petitioners' lands;

II.

failing to require Respondent to comply with federal environmental conditions precedent to condemnation;

III.

denying Petitioners trial by jury as at common law on the

controverted questions of necessity and the conditions precedent, particularly the environmental conditions?

CONSTITUTIONAL PROVISIONS AND STATUTES

The pertinent portions of the following constitutional provisions and statutes are set forth in Appendix D to this Petition:

United States Constitution:

Amendments V, VII and XIV

North Carolina Constitution:

Article I, §§ 19 and 25

Article IV, § 13

United States Code:

Title 28, § 1257(3)

Title 42, § 1982

Title 42, §§ 4332(A)(C)

Title 49, §§ 1716(c)(3)(4)(d)(e)

North Carolina General Statutes:

Chapter 40, §§ 40-10, 11, 12, 17 and 18

STATEMENT

Petitioners Irvin assert that their motion for review of the Decision of the North Carolina Court of Appeals as confirmed by the North Carolina Supreme Court involves substantial constitutional questions for that the taking of their lands denies them their right to substantive and procedural due process in violation of the United States Constitution, Amendments V, VII and XIV and the North Carolina Constitution §§ 19 and 25 of Article I and § 13 of Article IV, particularly violating Petitioners' rights to procedural due process in the failure of the Courts below to dismiss Respondent's condemnation action for Respondent's failure to comply with the conditions precedent to any condemnation by it as

established by Section 102(a)(c) of the National Environmental Policy Act of 1969, as Amended, 42 U.S.C.A. § 4332(A)(C), Virginians for Dulles v. Volpe, 344 F.Supp. 573 (1972), 541 F.2d 442 (1976) and the Airport Act, 49 U.S.C.A. § 1716(c)(3)(4)(d)(e), Life of the Land v. Brinegar, C.A.Hawaii 1973, 485 F.2d 460, cert. den. 94 S.Ct. 1979, 416 U.S. 961, 40 L.Ed.2d 312 (1974), and in failing to negotiate in good faith and in seeking to condemn Petitioners' dwelling houses, in violation of Chapter 40 of the North Carolina General Statutes, particularly Sections 40-10, 11, 12, 17 and 18, State Highway Commission v. Thornton, 271 N.C. 227, 156 S.E.2d 248 (1967); Charlotte v. Heath, 226 N.C. 750, 40 S.E.2d 600.

The constitutional and statutory

conditions precedent issues were timely raised in the pleadings, Responses filed August 25 and 27, 1975 [Rpp 9 ff at Rpp 11-12:

"FOURTH DEFENSE

In the alternative, as a PLEA IN BAR, these responding respondents DENY that petitioner has properly exercised any right of eminent domain it may have been properly granted by the State of North Carolina, for that there is no necessity for the taking of respondents' property; that such property is, on information and belief, sought to be acquired to be used for warehouses and other buildings to be rented to the public; the Greensboro-

High Point Airport lies within the Friendship Township, Guilford County, North Carolina, within that area designated as the watershed for the City of Greensboro, North Carolina. On information and belief, Federal funds have been extensively used and are to be used in the acquisition of lands, including the lands of these respondents; and on information and belief, no public hearings or statement, in compliance with Section 102(a)(c) of the National Environmental Policy Act of 1969 as amended, have been held or prepared nor made available to the President

of the United States, the Council on Environmental Quality and the public as provided by Section 552 of Title 5, United States Code; and such is a condition precedent to the exercise of condemnation; nor has petitioner complied with Section 16(c)(3)(4)(d)(e) of The Airport Act, the proposed actions of the Airport Authority having the following effects which are LIKELY to be significant:

(1) lead to a noticeable change in the ambient noise level for

a substantial number of people, residents of nearby communities such as The Cardinal;

(2) lead to significant increased air and water pollution in the area of The Cardinal because of the two (2) creeks flowing through the lands of the respondents;

(3) involve a reasonable probability of contamination of a public water supply source, treatment facilities and distribution system because of the proposed use of the lands for

storage of air cargo,
including poisonous
chemicals.

that respondents are ready, willing and able, through their private enterprise, to furnish such facilities and rent them to members of the general public; and such taking as sought to be made on behalf of petitioner is an unlawful and illegal exercise of any such right as they may imperfectly have. These respondents move the dismissal of petitioner's action."

and 13 ff at Rpp 15-16]:

". . . To take the respondents' property for

such purpose without prior hearings as to the necessity of such taking, or prior determination as to the power of the petitioner to exercise eminent domain, is violative of the due process provisions of the United States Constitution as well as the Fourteenth Amendment thereof, and of Article I, Section XIX of the North Carolina Constitution.

FIFTH DEFENSE

Petitioner has not complied with the requirements of the National Environmental Policy Act of 1969, as amended, in that there has been no public hearings or

> statement filed as required by the United States Code, which is a condition precedent to the exercise of condemnation. This action is, therefore, an unlawful exercise of the power of eminent domain. . ."

preserved before the Assistant Clerk and Clerk of Court for Guilford County by exceptions [Rpp 125-126; 141-142] and before Hal Hammer Walker, judge presiding over the June 27, 1977 Session of Superior Court for Guilford County, Greensboro Division, by Bill of Exceptions [Rpp 143 ff, XVII Rpp 156-157 cf. IV Rp 171 and (2) Rp 172; Rp C-30] and preserved on appeals [Rpp 174-175], filed and docketed October 5, 1977, to the North

Carolina Court of Appeals, and to the Supreme Court of North Carolina July 19, 1978. Such Objections and Exceptions were overruled by the Assistant Clerk and Clerk; overruled by the Superior Court; deemed by the North Carolina Court of Appeals as fully ". . .to raise any questions which require further discussion by this Court" [Rp A-35]; affirmed by the Supreme Court of North Carolina in allowing the dismissal of Petitioners' appeal for lack of a substantial constitutional question [Rp B-2]. They are preserved and brought forward here.

REASONS FOR GRANTING WRIT

(1) the cause involves legal principles of major significance to the jurisprudence of the United States, on the questions of uniform decisions as to the necessity of taking of private property for public airport uses, where federal funding is involved and the requirement of good faith negotiations to be conducted prior to taking; (2) the subject matter of the cause has significant public interest, involving uniform application of federal environmental law to the taking of land for airport purposes; "issues of far reaching importance", Touhy v. Ragen, 340 U.S. 462 at 470, 71 S.Ct. 416, 95 L.Ed 417, 423, left undecided in this case must be faced and (3) the decision

of the North Carolina Court of Appeals affirmed by the North Carolina Supreme Court appears to be in conflict with decisions of the Supreme Court.

The North Carolina Court of Appeals and the North Carolina Supreme Court held the constitutional and statutory conditions precedent questions insubstantial. Petitioners contend this to be reversible error in that both the National Environmental Policy Act of 1969 and the Airport Act are thus voided by state action denying Petitioners equal protection under the law and taking their property without due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

DID THE COURTS BELOW DENY

PETITIONER'S DUE PROCESS IN:

I.

failing to dismiss Respondent's action for condemnation for that Respondent has no present necessity for taking Petitioners' lands?

The Authority in its Complaint alleged the necessity of taking in Paragraphs VI, VII and XI [Rpp 4, 5-6, 7]. In response, the Petitioners stated in a First Defense [Rp 9] that ". . . There is no necessity for the taking of such lands, and the Petition is totally defective in that Petitioner fails to state in detail the specific use of such lands sought to be acquired . . .". In their Fourth Defense, [Rpp 10-11]

Petitioners answered that they denied "that petitioner has properly exercised any right of eminent domain it may have been properly granted by the State of North Carolina, for that there is no necessity for the taking of Respondents' property . . .". In their Fifth Defense, [Rp 12] Petitioners denied the allegations of Paragraphs VI, VII and XI where the necessity had been alleged.

Other Petitioners' Third Defense [Rpp 14-15] stated: "They plead in bar of the Petitioner's action both the failure to allege the specific use and the failure to show public necessity for the taking of the Respondents' land as required by G. S. Section 40-12." In their Fourth Defense, these Petitioners said "Respondents having denied the pub-

lic necessity for the taking of their land by the Petitioner, they plead in bar of the Plaintiff's action, that Petitioner has no authority to condemn . . .".

In spite of these repeated and explicit denials of allegations of necessity, the North Carolina Court of Appeals in its decision said: ". . . We hold that the allegations of the Responses were not adequate to raise the question of necessity in the trial court and the question is thus not before this Court on appeal." [Opinion, p. 3]

On their appeal, the Petitioners did not argue that necessary Airport purposes are not a public use. Petitioners sought a determination that the evidence failed to show <u>any necessity</u> for any taking of Petitioners'

property. There was no evidence of any proper public use within the reasonably foreseeable future. Indeed, on the question of necessity Respondent Airport Authority's Executive Director Sekadlo testified with respect to condemning land with fifty per cent reimbursement from the FAA as follows:

> "Q Whether you need it or not?
> A Well, right, <u>whether you need it or not</u>. (emphasis supplied)
> Q That's good business management?
> A Damn right. Because it's already been paid in by you and me when you buy airline tickets, and why should it go to Charlotte or some other place.
>
> [R.p. 89-90]"

Several recent cases from other states hold that eminent domain may not be exercised unless property taken is to be devoted to public use within a reasonable time after taking. Condemnation may not be based upon speculation by the condemnor as to its possible needs at some remote future time. This line of cases is set forth in an excellent treatise at 80 ALR 3d 1071.

In a Delaware case cited in that annotation, State of Delaware et rel Sharpe v. 0.62033 Acres of Land, 110 A 2d 1 (1954), the Highway Department was prevented from taking more land than was necessary for the present needs. The questions considered there were the identical questions asked to be reviewed by this Court in the instant

case. Both questions were decided against the Highway Department: (1) That necessity for taking land and the quantity thereof was a judicial, and not merely a legislative question; and (2) That the trial court was correct in deciding that there was no necessity for taking of land in contemplation of remote future needs.

It is not merely theoretical to say, that, if the general rule cited by the Court of Appeals in our case is to be applied inflexibly, any governmental authority could condemn any land and any amount of land as early as it wishes, and not be required to prove that it needs the land within the reasonable future. If such were the case, no landowner's land would

be safe from condemnation anywhere within the territorial jurisdiction of the condemnor. Surely this is not the intent of eminent domain law; and as certainly it marks the return of the property pendulum to its pre-Magna Charta nadir.

Petitioners Irvin PRAY REVERSAL and DISMISSAL of Respondent Airport's condemnation of their lands for that as a matter of law they are denied their rights to due process where the authority is permitted to take their lands, "whether it needs them or not". No present necessity for condemnation is shown on the record below; no public purpose is shown on the record below.

DID THE COURTS BELOW DENY PETITIONERS' DUE PROCESS IN:

II.

<u>failing to require Respondent to comply with federal environmental conditions precedent to condemnation?</u>

The applicable statutes have not been followed; no negotiations in good faith or otherwise were conducted with the Irvins [Rpp 74-75, 106, 109], Dwelling houses were condemned [Rp 111]. The environmental requirements of the applicable statutes were not met. Mr. Sekadlo, testifying,

"To my knowledge, I did not file any other environmental statement other than this let-

ter [letter marked Exhibit F, Answers to Interrogatories, under date of February 22, 1972] to David Kelley, chief of Atlanta Airports to Operations Branch, Department of Transportation, Federal Aviation Administration, dated February 22nd, 1972 and which letter moved on from there through the proper channels and approvals and so forth." [Rpp 72-73][cf Rp 21, 25]

Such letter was a negative declaration; [Exhibits F, G and H; Rp 21]; Respondent prepared no environmental impact statement relating to surface water, drainage, portions of lands sought to be acquired and changes [Rp 25]. See Appendix C, Paragraph IV, Rp C-28.

DID THE COURTS BELOW DENY PETITIONERS' DUE PROCESS IN:

III.

denying Petitioners trial by jury as at commor law on the controverted questions of necessity and the conditions precedent, particularly the environmental conditions?

The constitutional right of the appellants to a jury trial on the question of necessity of taking for public purpose is mooted where the Court determines, as a matter of law, that an indefinite "need" for "future expansion" is not a public purpose. The Court has here failed to so decide and the question of denial of the Seventh Amendment right is reached. Respondents have the right to require

the petitioner to comply strictly with all statutory procedures, City of Charlotte v. McNeely, 8 N.C.App. 649, 185 S.E.2d 348 (1970), modified and affirmed 281 N.C. 684, 190 S.E.2d 179 (1972).

It is elementary that appellants are entitled to equal treatment under the Airport Act, 49 U.S.C.A. § 1716(c)(3)(4)(d)(e), and the National Environmental Policy Act of 1969 as beneficiaries, and that the burden of proof to show compliance with these conditions precedent and those prescribed by Chapter 40, North Carolina General Statutes, is upon the taker. Obviously the authority cannot show such compliance and can show only an arbitrarily capricious proceeding to take

the lands of appellants without due process and without jury trial in order that federal money should not ". . .go to Charlotte or some other place." [Rpp 89-90]. Petitioners' civil rights have been thus violated, 42 U.S.C.A. 1982.

CONCLUSION

Petitioners urge the vacation of the judgments below for that the federal environmental pre-conditions were not met and further that the Courts below erred in deciding that the question of necessity had not been raised, and therefore was not before the Court, [or that it had been raised and judicially determined to exist]. We submit that the question of necessity should be uniformly held to require present necessity in the Courts of these United States where federal funds and statutes apply and that "necessity" involves the element of "when" the property will be put to public use. Where the evidence establishes a remote, indefinite future time, a jury question arises.

Petitioners have been deprived of their property arbitrarily and capriciously without due process of law.

Petitioners pray that the decision of the North Carolina Court of Appeals as confirmed by the North Carolina Supreme Court be reviewed, that it be reversed and Respondent's action dismissed.

RESPECTFULLY SUBMITTED this the 4th day of December, 1978.

DEES, JOHNSON, TART, GILES & TEDDER

By: _____
Counsel for Petitioners
P. O. Box 3344
Greensboro, North Carolina 27402
(919) 378-9750

ARMISTEAD W. SAPP, JR.

_____
Counsel for Petitioners
219 West Washington Street
Greensboro, North Carolina 27401
(919) 275-7206

APPENDIX A

NO. 7718SC817

NORTH CAROLINA COURT OF APPEALS

Filed: 20 June 1978

GREENSBORO-HIGH POINT
AIRPORT AUTHORITY

Guilford County
No. 75SP870

v

PEARL TAYLOR IRVIN, et als

Appeal by respondents from Walker (Hal H.), Judge. Judgment entered 1 July 1977 in Superior Court, Guilford County. Heard in the Court of Appeals 10 March 1978.

On 1 July 1975, petitioner Greensboro-High Point Airport Authority (Authority) filed its petition instituting condemnation proceedings pursuant to G.S. Chapter 40, seeking to acquire fee simple title to a 90.35 acre tract of land owned by respondents for purposes of the expansion of the Greensboro/High Point/Winston-Salem Regional

Airport. Responses were filed on behalf of the respondents challenging, inter alia, the necessity of the taking of their land, the sufficiency of the Authority's effort to purchase the land by private negotiations, the constitutionality of the taking of the property, and denying, generally, the allegations of the Authority's petition.

The matter came on for hearing before John F. Yeatts, Jr., Assistant Clerk of Superior Court of Guilford County, on 11 May 1976, at which time the parties presented evidence. On 5 August 1976, an order was entered containing findings of fact and conclusions of law, overruling respondents' defenses, and appointing Commissioners of Appraisal to determine the compensation which

the Authority should pay to respondents.

On 27 August 1976, the Commissioners took their oath and conducted a hearing. On 24 November 1978, the Commissioners filed their report with the clerk, assessing respondents' damages at $310,000.

Respondents filed objections and exceptions to the report of the Commissioners and the matter was heard by J. P. Shore, Clerk of Superior Court of Guilford County; on 28 February 1977, a Judgment of Confirmation was filed by the clerk confirming the report of the Commissioners. Respondents gave notice of appeal to superior court.

Upon stipulation of the parties, the superior court determined the appeal based upon the record of the proceedings before the clerk, which

consisted essentially of transcripts of testimony and exhibits. Based upon the record and the oral arguments presented on behalf of the parties, the trial court, on 7 July 1977, entered judgment setting out findings of fact and conclusions of law favorable to the Authority, overruling respondents' various exceptions and objections, and affirming the Judgment of confirmation except insofar as it related to the amount of compensation to be paid to respondents, upon which question respondents are entitled to a trial by jury.

Respondents gave notice of appeal to this Court from the judgment of the superior court.

The factual circumstances which have given rise to this litigation are, to the extent necessary for a determination of this appeal, reflected in the trial court's findings

of fact, pertinent paragraphs of which are set out in the opinion which follows.

Cooke & Cooke, by William Owen Cooke, for petitioner.

Armistead W. Sapp, Jr., and Dees, Johnson, Tart, Giles & Tedder, by J. Sam Johnson, Jr., for respondents.

Brock, Chief Judge.

Respondents' challenge to the Authority's efforts to annex the land in question is brought forward in three assignments of error presented in three arguments. At the outset, we note that the Authority derives its existence and powers from Chapter 98, Public-Local Laws of 1941, as amended. Section 7 of said Chapter 98, as amended by Chapter 601, Session Laws

of 1943 and Chapter 793, Session Laws of 1969, authorizes the Authority to acquire needed property by exercise of the power of eminent domain pursuant to Chapter 40 of the North Carolina General Statutes. Section 6 of the aforementioned Chapter 98, Public-Local Laws of 1941, declares that any lands acquired, owened, etc. by the Authority are so acquired, owned, etc. for a public purpose. See also G.S. 63-5. It is also clearly established by judicial decisions that the taking of land for the establishment and maintenance of a municipal airport is for a public purpose. Vance County v. Royster, 271 N.C. 53, 155 S.E.2d 790 (1967).

For their first assignment of error, respondents contend that petitioner has failed to show a necessity

for the taking of their land. Respondents present various factual arguments and legal theories in an attempt to raise a defense of lack of necessity, primarily aimed at a failure of the Authority to show precisely when the land will be needed for the specific use envisioned. However, we hold that the allegations of the responses were not adequate to raise the question of necessity in the trial court and the question is thus not before this Court on appeal.

As noted supra, the taking of land for airport purposes is a taking for a public purpose. As a general rule, once the public purpose is established, the necessity or expediency of the taking is a legislative, and not a judicial question. City of Charlotte v. McNeely, 281 N.C. 684, 190

S.E.2d 179 (1972); Jeffress v. Greenville, 154 N.C. 490, 70 S.E. 919 (1911). To the foregoing rule proscribing judicial interference with the condemning body's determination of necessity, there is an exception, to wit: "Upon specific allegations tending to show bad faith, malice, wantonness, or oppressive and manifest abuse of discretion by the condemnor, the issue raised becomes the subject of judicial inquiry as a question of fact to be determined by the judge." (Emphasis added.) City of Charlotte v. McNeely, supra, 281 N.C. at 690, 190 S.E.2d at 185, and cases cited therein.

The Authority commenced this action by filing a verified petition wherein the jurisdictional requirements as set out by G.S. 40-12 were fully alleged, including allegations as to

necessity. An examination of the responses filed by respondents reveals no allegations as to necessity which rise above a denial of petitioner's allegations; there are no "specific allegations tending to show bad faith, malice, wantonness, or oppressive and manifest abuse of discretion" so as to invoke judicial review of the Authority's determination. See Redevelopment Commission v. Grimes, 277 N.C. 634, 178 S.E.2d 345 (1971).

The sole factual question raised by the Authority's allegations of, and respondent's denial of necessity for condemnation is whether the property is being condemned in good faith to conduct public business. Webster, Real Estate Law in North Carolina § 358, pp. 479-480 (1971). The trial court made the following pertinent

findings of fact (parenthetical references to the transcript of hearing before the Clerk of Superior Court and to exhibits are omitted):

"V. Petitioner's Board of Directors, at a meeting held on 19 March 1968, approved a plan for the expansion and enlargement of the facilities of the Greensboro/High Point/ Winston-Salem Regional Airport prepared by Paul Stafford Associates-Arnold Thompson Associates, Inc. Said plan was entitled 'Master Plan for the Greensboro/High Point/ Winston-Salem Regional Airport'. This plan provided for the construction of a new terminal building, new cargo

handling facilities and other facilities connected with the airport. Said plan provided for such new construction in the northwest quadrant for the four quadrants formed by the airport runways entitled '5-23' and '14-32'. The relocation and expansion of facilities shown by said plan was to enable petitioner to provide adequate facilities for the rapid increase in the use of the airport by members of the public and to meet the increased demands of the public for airport services. The plan included the property owned by respondents which is described in Paragraph VI of the petition as part of the

property which it would be necessary for petitioner to acquire in order to carry out the expansion plan."

* * *

"VII. In 1970, new federal regulations required the construction of a new taxiway parallel to Runway 5-23 at a location other than the location shown in the 1968 Master Plan. As a result, the cargo area shown on the 1968 Master Plan had to be relocated, and to that end, a layout plan was prepared by Southern Mapping and Engineering Company changing the 1968 Master Plan by moving the proposed new location of the cargo area for

the expanded airport facilities onto said tract of land owned by respondents. This new layout plan which changed the 1968 Master Plan was approved by the Board of Directors of petitioner at a meeting held on 24 May 1971."

* * *

"X. The Board of Directors of petitioner, at a meeting held on 29 August 1974, approved a 1973 update of the 1968 Master Plan which incorporated the amendment to the 1968 Master Plan effected by the layout plan prepared by Southern Mapping and Engineering Company which had been approved by the Board of Directors at a meeting held on 24 May 1971. The update

of the 1968 Master Plan is entitled 'Master Plan for the Greensboro/High Point/ Winston-Salem Regional Airport' and it was prepared by Arnold Thompson Associates, Inc. This 1973 Master Plan included respondents' property as a part of the expanded airport and also designated its use for cargo area."

* * *

"XII. Respondents' property is located in the northwest quadrant of the airport which is the area in which the projected expansion is to be located. Petitioner has already carried out many of the proposals for expansion set forth in the 1968 Master

Plan. Two Fixed Base Operations are now located in the northwest quadrant of the airport as well as a new Control Tower and a new Weather Bureau. Petitioner has employed an architect to design a new terminal building to be constructed in the northwest quadrant as contemplated by the Master Plan. The architect has also been retained to design cargo facilities, but is not presently working on this project."

* * *

"XIV. Public interest and public necessity require petitioner to take and acquire for the use and benefit of petitioner and the public the fee simple

title to the tract of land located near the Greensboro/High Point/Winston-Salem Regional Airport in Friendship Township Guilford County, North Carolina, which is described in Paragraph VI of the petition. Petitioner in good faith has found that it requires said tract of land described in Paragraph VI of the petition for the purpose of carrying on and conducting public business which petitioner is authorized to conduct and carry on. Said tract of land is needed and required in order that petitioner may use the same for cargo handling activities in connection with the planned expansion of the Greensboro/

High Point/Winston-Salem Regional Airport, including the construction of a cargo building thereon, and also in order to facilitate the use by petitioner of its other properties for airport purposes and, in addition, said property is required in connection with the general development and expansion by petitioner of the Greensboro/ High Point/Winston-Salem Regional Airport. Said acquisition of said property by petitioner in fee simple is necessary for the proper maintenance, improvement and development of the airport."

These findings of fact, which establish

that the Authority carried its burden of proof to show that the land in question is being taken in good faith for a public purpose, are supported by evidence which was before the trial court and are thus conclusive on appeal. Blackwell v. Butts, 278 N.C. 615, 180 S.E.2d 835 (1971). Respondents' first assignment of error is overruled.

For their second assignment of error, respondents contend that the evidence does not support the trial court's finding that the Authority negotiated in good faith for the purchase of respondents' property prior to instituting condemnation proceedings. We disagree.

The condemnation proceedings set out in Article 2 of G.S. Chapter 40 can be invoked by a corporation possessing the power of eminent domain if

the condemnor "is unable to agree for the purchase of any real estate required" for its purposes. G.S. 40-11. A petition filed to institute condemnation proceedings must allege "that the corporation has not been able to acquire title [to the real estate], and the reason of such inability." G.S. 40-12. In the present case, the Authority alleged that it made a good faith effort to purchase the land in question but that it was unable to agree on a price with respondents. This allegation was denied by respondents, thus raising an issue of fact for the trial judge, upon which the Authority bore the burden of establishing the facts as alleged. Webster, supra, § 358, pp. 479-480.

As to the question of the Authority's attempts to acquire the

property by purchase, the trial court made the following findings of fact (parenthetical references to the transcript and exhibits are, once again, omitted):

> "VIII. As a result of a request by petitioner's staff personnel, appraisals of the property of respondents described in Paragraph VI of the petition were made by Wayne Sudderth and Calvin Reynolds, both competent real estate appraisers. On 19 February 1973, Wayne Sudderth reported an appraisal of $225,000.00 for respondents' property, and on 20 March 1973 Calvin Reynolds report an appraisal of $244,375.00 for respondents' property. Calvin Reynolds was

also employed by petitioner to conduct negotiations for the purchase of properties needed by the Authority in its expansion program. One of the employees of Mr. Reynolds in the performance of these duties was R. J. Leftwich. In April, 1973, Mr. Leftwich endeavored to determine on behalf of petitioner, if respondents might be interested in selling this property to petitioner for the sum of $225,500.00. Mr. Leftwich met with respondents and conveyed to respondents an offer by petitioner to purchase respondents' property for $225,500.00. Respondents indicated such amount was

totally insufficient and respondent Charles W. Irvin, Jr., stated that he thought the property was worth at least $10,000.00 to $12,000.00 an acre plus the replacement cost of all improvements, a sum in excess of $1,000,000.00. The results of this conference were conveyed to petitioner on 14 May 1973.

IX. The Board of Directors of petitioner, at a meeting held on 6 August 1973, adopted a resolution authorizing the Executive Director of petitioner to offer to pay the appraised value of respondents' property as determined by competent appraisers, subject to any agreement to accept such

appraised value being approved by the land subcommittee of of the Board of Directors and by the Authority. Said resolution further provided that if respondents' property could not be purchased at its appraised value as so determined, petitioner should institute condemnation proceedings therefor. At the time this resolution was adopted, the 1968 Master Plan approved by the Board of Directors of petitioner on 19 March 1968 had been amended by the layout plan prepared by Southern Mapping and Engineering Company approved by the Board of

Directors of petitioner on 24 May 1971 so as to show that the plan for the use of respondents' property was for a cargo area."

* * *

"XI. Petitioner's Executive Director obtained new appraisals of respondents' property from Wayne Sudderth and Calvin Reynolds, both competent appraisers. On 20 June 1975, Wayne Sudderth appraised respondents' property at $225,000.00, and Calvin Reynolds on 11 July 1975 appraised respondents' property at $254,000.00. On 12

July 1974, petitioner's Executive Director, on behalf of petitioner, offered to purchase respondents' property for $254,000.00, and requested a response within 30 days. Such offer was made by letter to C. W. Irvin, Jr., Doris Irvin Egerton, John L. Irvin and Pearl T. Irvin. There was no response to said offer by Charles Watson Irvin, Jr. John L. Irvin responded by letter dated 1 August 1974, in which he rejected petitioner's offer of $254,000.00. At the time said letter was written

petitioner's Executive Director, respondent Charles W. Irvin, Jr., valued respondents' property in excess of One Million Dollars ($1,000,000.00), and would not accept any amount less than Twelve Thousand to Thirteen Thousand Dollars per acre for respondents' property or a total sum of over One Million Dollars plus the replacement cost of the clubhouse and all other buildings."

* * *

"XVII. Petitioner, acting through its officer, agents and representatives, has made an effort in good

faith to purchase and acquire title to the real property described in Paragraph VI hereof, from the owners thereof, to wit: respondents named herein, but petitioner and said respondents have been unable to agree on a price or compensation for said tract of land."

In our opinion, the preliminary facts as found in VIII, IX and XI, supra, are supported by the evidence and are thus conclusive on appeal, and support the ultimate finding of fact XVII, supra.

G.S. 40-11 and 40-12 require a condemnor to "make a bona fide effort to purchase by private negotiation" prior to instituting

condemnation proceedings. Power Co. v. King, 259 N.C. 219, 220-221, 130 S.E.2d 318, 320 (1963). The Authority was aware that respondents felt that their land was worth in excess of $1,000,000.00. The Authority's resolution of 6 August 1973 authorized an offer to purchase respondents' land at its appraised value; an offer was conveyed to respondents by letter of 12 July 1974, offering the highest of several appraisals secured by the Authority. No higher offer was authorized by the Authority. The offer was rejected by letter by respondent John L. Irvin, although he indicated his willingness to sell at a reasonable and just price. However, we do not feel upon the facts of this case, that the Authority was required to explore the matter further since

earlier negotiations had revealed that respondents would sell only at a price far in excess of that which the Authority was willing to offer. See Power Co. v. Moses, 191 N.C. 744, 133 S.E. 5 (1926). In many respects, the facts of the instant case are similar to those in Murray v. City of Richmond, 257 Ind. 548, 276 N.E.2d 519 (1971); wherein the condemnor offered to purchase property at its appraised value of $40,000 and the condemnees counter-offered in the amount of $500,500 (later reduced to $100,000). The condemnor refused the counter-offers and instituted condemnation proceedings. On appeal, the condemnees argued that the trial court erred in finding that there had been a bona fide effort to purchase in that the condemnor had refused to negotiate

upward from the $40,000 figure. The following language in the Murray opinion is pertinent to the case at bar:

> "We do not agree with appellants' contention in this regard. We do not construe the language [of the statute pertaining to negotiations] to mean that the condemning authorities must first make an offer of a figure below that which they believe to be the maximum they could justify paying for the property, then through a series of negotiations bargain with the property owner until some figure within what the Commission might consider to be

reasonable was agreed upon. In fact, it appears to be much more honest and forthright on the part of the condemning authority to come forth in their initial offer with the highest price they feel they could reasonably justify paying for the property. The fact that a property owner might place a higher value on his real estate and attempt to induce the condemning authority to pay a higher price does not bind the condemning authority to raise its figure.

> We do not interpret the word "negotiations" in

the statute to mandate a series of encounters of offers and counter-offers in an attempt to arrive at a price. Where as here, the condemning authority has employed professional appraisers and has based its firm offer to purchase on figures presented to it by its appraisers, we hold that such an offer to purchase meets the requirement to negotiate as set out in the statute." 276 N.E.2d at 522.

We hold that the evidence in the case sub judice indicates that the Authority made the requisite bona fide, good faith effort to acquire respondents' property by purchase,

and supports the trial court's finding to that effect.

Under their second assignment of error, respondents have attempted to present several distinct questions of law, in violation of App. Rule 10(c); the assignment is a broadside assignment and is subject to being overruled for that reason. However, we elected to deal with respondents' contention relating to the sufficiency of the Authority's attempt to purchase the land; we have also elected to deal with respondents' contention that G.S. 40-10 prohibits the Authority from condemning the land in question because of the presence thereon of one or more dwelling houses.

We reject this latter contention, based upon the reasoning of Mount Olive v. Cowan, 235 N.C. 259, 69 S.E.2d 525 (1952), which held that the limitation of G.S. 40-10 applied only to corporations named in Article 1 of G.S. Chapter 40 and not to a corporation deriving its power to condemn from some other act of the legislature. The Authority derives its power to condemn, as noted at the outset of this opinion, from Chapter 98, Public-Local Laws of 1941 as amended, and is not one of the corporations named in the sections preceding G.S. 40-10.

Respondents' second assignment of error is overruled.

For their third assignment of error, respondents contend that they

have been deprived of rights guaranteed them by the United States and North Carolina Constitutions. Respondents attempt to raise, once again, the question of necessity of the taking of their land; having dealt with the question, supra, we decline to do so again.

Respondents' contention that the Authority's petition did not comply with the requirements of G.S. 40-12 by stating in detail the nature of the public business and the specific use for which the land is sought is without merit and warrants no discussion. In our opinion, respondents' third assignment of error fails to raise any questions which require further discussion by this Court.

The decision of the trial court

is

Affirmed.

Judges HEDRICK and MITCHELL concur.

APPENDIX B

No. 201PC EIGHTEENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

Spring Term 1978

****

GREENSBORO-HIGH POINT AIRPORT AUTHORITY	JUDGMENT DISMISSING APPEAL ON MOTION OF PLAINTIFF AND
v.	DENYING PETITION FOR DISCRETIONARY REVIEW
PEARL TAYLOR IRVIN, ET AL	(7718SC817)

****

This matter came on to be considered upon defendant's notice of appeal from the North Carolina Court of Appeals, pursuant to G. S. 7A-30, upon the plaintiff's motion to dismiss the appeal for lack of a substantial constitutional question, and upon defendant's petition for discretionary review of the decision of the North Carolina Court of Appeals,

pursuant to G. S. 7A-31; upon consideration whereof, it is adjudged by the Court in conference this 29th day of August, 1978, that the motion to dismiss the appeal be allowed, that the petition for discretionary review be denied, and that it be so certified to the North Carolina Court of Appeals.

It is considered and adjudged further that the defendant do pay the sum of NINE AND NO/100 DOLLARS ($9.00) and execution issue therefor.

s/ Exum, J.
For the Court

This foregoing order is issued over my hand and seal of the Supreme Court this 7th day of September, 1978.

s/ John R. Morgan
John R. Morgan
Clerk of the Supreme
Court of North Carolina

cc: North Carolina Court of Appeals
Dees, Johnson, Tart, Giles &
Tedder, Attorneys at Law
Mr. Armistead W. Sapp, Jr.,
Attorney at Law
Cooke and Cooke, Attorneys at Law

APPENDIX C

FILED: JUL 7 1:29 PM '77
J. P. SHORE
CLERK OF SUPERIOR COURT
GUILFORD COUNTY, N.C.

NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE
GUILFORD COUNTY	SUPERIOR COURT DIVISION

GREENSBORO-HIGH POINT AIRPORT AUTHORITY, Petitioner,	
VS.	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER
PEARL TAYLOR IRVIN, CHARLES WATSON IRVIN, JR., and wife, MARY S. IRVIN, JOHN LAFAYETTE IRVIN and wife, NANCY B. IRVIN and DORIS IRVIN EGERTON and husband, GEORGE G. EGERTON, Respondents.	75 SP 870

THIS CAUSE COMING ON TO BE HEARD, and being heard by and before the undersigned Judge presiding at the June 27, 1977, Civil Session of the Superior Court of Guilford County, North Carolina, upon the exceptions taken by

Respondents herein to the Findings of Fact and Conclusions of Law made by the Clerk of the Superior Court of Guilford County, North Carolina, and the Order entered thereon by said Clerk appointing Commissioners of Appraisal, dated August 5, 1976, and also upon the appeal of Respondents from the Judgment of Confirmation entered herein by the Clerk of said Court, confirming the Report of Commissioners filed November 24, 1976; and

IT APPEARING TO THE COURT that all parties were before the Court, and for purposes of the appeal to this Court were duly represented by counsel; and

IT FURTHER APPEARING that all parties through their respective counsel stipulated and agreed in open Court

that this appeal would be heard by the Court upon the Record of the Proceedings before the Clerk of Court, consisting of transcripts of evidence adduced at hearings, all exhibits relating thereto; and all other documents, orders and proceedings had in connection therewith; and

IT FURTHER APPEARING that counsel for all parties, in open Court, stipulated that any judgment, order or other decision, including Findings of Fact, Conclusions of Law made or entered by the Court in this matter could be made and entered out of Session, out of District and at the convenience of the Court; and

THE COURT, having heard oral argument and contentions of counsel for both

Petitioner and Respondents, examined and studied the entire record, including Respondents' transcript of Kinard's interview with Sekadlo, filed by Respondents as "newly discovered" evidence, and stipulations of counsel herein, as well as written briefs of said counsel, upon such Record of Proceedings, exhibits and stipulations makes the following

FINDINGS OF FACT

I.

This proceeding was instituted on the 1st day of July, 1975, by the filing of a petition and the issuance of summons. Said summons and a copy of the petition were duly served on each of the respondents and said respondents, within due time, have each filed answer herein as appears of record.

All necessary parties to this proceeding are before the Court and the Court has jurisdiction of the subject matter thereof.

II.

Petitioner, Greensboro-High Point Airport Authority, is a body politic and corporate of the State of North Carolina, created by the General Assembly of the State of North Carolina, pursuant to Chapter 98 of the Public-Local Laws of North Carolina, Session 1941, and the amendments thereto.

III.

Petitioner conducts and carries on the public business authorized by

the provisions of said Public-Local Laws of North Carolina, and the various amendments thereto, and in good faith intends to continue to conduct and carry on such public business (Tr-p. 16-22). In the conducting and carrying on of said public business, petitioner owns, operates, maintains and controls, and in good faith intends to continue to own, operate, maintain and control the Greensboro/ High Point/Winston-Salem Regional Airport located in Friendship and Deep River Townships, Guilford County, North Carolina. Said airport is operated by petitioner for the benefit and use of the public in order

---

Tr-p. - designates Transcript of hearing before clerk held on May 11-12, 1976.

to supply the needs of the public for airport services and facilities (Tr-p. 16-22). It is used extensively by residents of Guilford County and the public in general for aviation purposes and purposes incidental thereto. It is used for the transportation of persons, property and mail and, in connection therewith, petitioner provides runways for the landing of aircraft an air terminal building for the convenience of passengers and others, space for the transfer of cargo and, through its various tenants, it provides rental car services, parking services for automobiles, facilities for flying instruction, fuel facilities, restaurant and banking facilities and other facilities for the convenience and comfort of members

of the public using the airport (Tr-p. 16-22). The ownership, operation, maintenance and control of said airport by petitioner is for a public purpose (Tr-p. 16-22).

IV.

Petitioner possesses the power of eminent domain, including the right to take real property which is necessary for conducting and carrying on the business and operations of the petitioner for said public purpose. Petitioner has the right to acquire title to real property in fee simple by condemnation proceedings conducted under the provisions of Chapter 40 of the General Statutes of North Carolina (Sec. 7, Chapter

601, Session Laws 1943).

V.

Petitioner's Board of Directors, at a meeting held on 19 March 1968, approved a plan for the expansion and enlargement of the facilities of the Greensboro/High Point/Winston-Salem Regional Airport prepared by Paul Stafford Associates-Arnold Thompson Associates, Inc. (PX-2). Said plan was entitled "Master Plan for the Greensboro/High Point/Winston-Salem Regional Airport" (PX-1). This plan provided for the construction of a new terminal building, new cargo handling facilities and other facilities connected with

---

PX - indicates Petitioner's Exhibit No.

the airport. Said plan provided for such new construction in the northwest quadrant of the four quadrants formed by the airport runways entitled "5-23" and 14-32" (PX-1). The relocation and expansion of facilities shown by said plan was to enable petitioner to provide adequate facilities for the rapid increase in the use of the airport by members of the public and to meet the increased demands of the public for airport services (PX-1). The plan included the property owned by respondents which is described in Paragraph VI of the petition as part of the property which it would be necessary for petitioner to acquire in order to carry out the expansion plan (PX-1).

VI.

On or about 15 June 1972, an offer was made to petitioner by the United States, through the Federal Aviation Administration, under the provisions of the Airport and Airway Development Act of 1970 enacted by the United States Congress, to reimburse petitioner for one-half of the costs incurred by petitioner in acquiring lands for airport expansion included within a project known as Project 8-37-0026002. This offer was made through the Federal Aviation Administration as a result of applications filed by petitioner (RX-2; Tr-p. 77-79). The tract of land owned by respondents which is described in

---

RX - indicates Respondents' Exhibit No.

Paragraph VI of petitioner's petition was included within the lands to be acquired under said project (Tr-p. 76). At a regular meeting of the Board of Directors of petitioner held on 16 June 1972, this offer made through the Federal Aviation Administration was accepted by petitioner (RX-1). Petitioner, by the acceptance of said offer, expressed its intent to acquire the lands embraced within the project for the purposes of airport expansion and to begin accomplishment of the project within 30 days after 16 June 1972 (RX-1).

VII.

In 1970, new federal regulations required the construction of a new taxiway parallel to Runway 5-23 at a

location other than the location shown in the 1968 Master Plan (Tr-p. 41). As a result, the cargo area shown on the 1968 Master Plan had to be relocated and, to that end, a layout plan was prepared by Southern Mapping and Engineering Company changing the 1968 Master Plan by moving the proposed new location of the cargo area for the expanded airport facilities onto said tract of land owned by respondents (Tr-p. 66-69; PX-13). This new layout plan which changed the 1968 Master Plan was approved by the Board of Directors of petitioner at a meeting held on 24 May 1971 (Tr-p. 69; PX-14).

VIII.

As a result of a request by petitioner's staff personnel appraisals

of the property of respondents described in Paragraph VI of the petition were made by Wayne Sudderth and Calvin Reynolds, both competent real estate appraisers. On 19 February 1973, Wayne Sudderth reported an appraisal of $225,000.00 (PX-7) for respondents' property, and on 20 March 1973, Calvin Reynolds report an appraisal of $244, 375.00 for respondents' property (PX-6). Calvin Reynolds was also employed by petitioner to conduct negotiations for the purchase of properties needed by the Authority in its expansion program (Tr-p. 92; Tr-p. 75). One of the employees of Mr. Reynolds in the performance of these duties was R. J. Leftwich (Tr-p. 74-75). In April, 1973, Mr. Leftwich endeavored to determine, on behalf of petitioner, if respondents might be interested in selling this

property to petitioner for the sum of $225,500.00 (Tr-p. 92; Tr-p. 142, PX-8). Mr. Leftwich met with respondents and conveyed to respondents an offer by petitioner to purchase respondents' property for $225,500.00 (Tr-p. 142). Respondents indicated such amount was totally insufficient and respondent Charles W. Irvin, Jr., stated that he thought the property was worth at least $10,000.00 to $12,000.00 an acre plus the replacement cost of all improvements, an sum in excess of $1,000, 000.00 (Tr-p. 143). The results of this conference were conveyed to petitioner on 14 May 1973 (PX-23).

IX.

The Board of Directors of petitioner, at a meeting held on 6 August

1973, adopted a resolution authorizing the Executive Director of petitioner to offer to pay the appraised value of respondents' property as determined by competent appraisers, subject to any agreement to accept such appraised value being approved by the land subcommittee of the Board of Directors and by the Authority (Petitioner's Answer to Interrogatories No. 15-Exhibit C). Said resolution further provided that if respondents' property could not be purchased at its appraised value as so determined, petitioner should institute condemnation proceedings therefor. At the time this resolution was adopted, the 1968 Master Plan approved by the Board of Directors of petitioner on 19 March 1968 had been amended by the layout

plan prepared by Southern Mapping and Engineering Company approved by the Board of Directors of petitioner on 24 May 1971 so as to show that the plan for the use of respondents' property was for a cargo area.

X.

The Board of Directors of petitioner, at a meeting held on 29 August 1974, approved a 1973 update of the 1968 Master Plan which incorporated the amendment to the 1968 Master Plan effected by the layout plan prepared by Southern Mapping and Engineering Company which had been approved by the Board of Directors at a meeting held on 24 May 1971 (PX-4). The update of the 1968 Master Plan is entitled "Master Plan for the

Greensboro/High Point/Winston-Salem Regional Airport" and it was prepared by Arnold Thompson Associates, Inc. (PX-3). This 1973 Master Plan included respondents' property as a part of the expanded airport and also designated its use for cargo area. (PX-3).

XI.

Petitioner's Executive Director obtained new appraisals of respondents' property from Wayne Sudderth and Calvin Reynolds, both competent appraisers. On 20 June 1975, Wayne Sudderth appraised respondents' property at $225,000.00 (Tr-p. 62; PX-11), and Calvin Reynolds on 11 July 1975 appraised respondents' property at $254,000.00 (Tr-p. 63; PX-12). On 12 July 1974, petitioner's Executive Director, on behalf of petitioner,

offered to purchase respondents' property for $254,000.00, and requested a response within 30 days (Tr-p. 63-64; Tr-p. 70, PX-9). Such offer was made by letter to C. W. Irvin, Jr., Doris Irvin Egerton, John L. Irvin and Pearl T. Irvin (PX-9). There was no response to said offer by Charles Watson Irvin, Jr. (Tr-p. 150). John L. Irvin responded by letter dated 1 August 1974, in which he rejected petition's offer of $254,000.00 (Tr-p. 71-72; PX-15). At the time said letter was written by petitioner's Executive Director, respondent Charles W. Irvin, Jr., valued respondents' property in excess of One Million Dollars ($1,000,000.00), and would not accept any amount less than Twelve Thousand to Thirteen Thousand Dollars per acre for respondents' property or a total sum of over One Million Dollars plus the replacement cost of the

clubhouse and all other builidngs (Tr-p. 150).

XII.

Respondents' property is located in the northwest quadrant of the airport which is the area in which the projected expansion is to be located (Tr-p. 31). Petitioner has already carried out many of the proposals for expansion set forth in the 1968 Master Plan (Tr-p.31). Two Fixed Base Operations are now located in the northwest quadrant of the airport as well as a new Control Tower and a new Weather Bureau (Tr-p. 31). Petitioner has employed an architect to design a new terminal building to be constructed in the northwest quadrant as contemplated by the Master Plan (Tr-p. 127). The architect has also

been retained to design cargo facilities, but is not presently working on this project (Tr-p. 127).

XIII.

Certain improvements are located on respondents' property. Among these are a main house and a tenant house (Tr-p. 154). The main house (sometimes referred to as a "clubhouse") (Tr-p. 157) was not in use as a dwelling in August 1975 (Tr-p. 157). The tenant house has a "dweller" in it (Tr-p. 155).

XIV.

Public interest and public necessity require petitioner to take and acquire for the use and benefit of

petitioner and the public the fee simple title to the tract of land located near the Greensboro/High Point/Winston-Salem Regional Airport in Friendship Township, Guilford County, North Carolina, which is described in Paragraph VI of the petition. Petitioner in good faith has found that it requires said tract of land described in Paragraph VI of the petition for the purpose of carrying on and conducting the public business which petitioner is authorized to conduct and carry on. Said tract of land is needed and required in order that petitioner may use the same for cargo handling activities in connection with the planned expansion of the Greensboro/High Point/Winston-Salem Regional Airport, including the construction of a cargo building thereon, and also in order to facilitate the use by petitioner

of its other properties for airport purposes and, in addition, said property is required in connection with the general development and expansion by petitioner of the Greensboro/High Point/Winston-Salem Regional Airport (PX-1; PX-3; PX-13). Said acquisition of said property by petitioner in fee simple is necessary for the proper maintenance, improvement and development of the airport (PX-1; PX-3; PX-13).

XV.

The respondents are the only parties who own or have or claim to own or have estates or interests in said tract of land described in Paragraph VI of the petition and the interest of respondents in the fee simple title therein

are as alleged in the petition, to wit: respondent Pearl Taylor Irvin owns a dower interest in an undivided one-half interest in said tract of land and, subject to said dower interest, respondents Charles W. Irvin, Jr., John LaFayette Irvin and Doris Irvin Egerton each owns an undivided one-third interest in said tract of land in fee simple, subject to the marital rights of his or her respective spouse. Said tract of land is subject to the lien of all unpaid Guilford County ad valorem taxes and all unpaid assessments for sewer, water, or other local improvements made or assessed against said tract of land by Guilford County, all of which should be paid out of such award as may be made in this proceeding to respondents as owners of said tract of

land. Said tract of land is subject to all public utility easeements and rights of way of record.

XVI.

The failure, if any, of said Commissioners of Appraisal to comply strictly with statutory provisions regarding promptness in the filing of their reports or in any other respects constituted mere irregularities which in no way adversely affected the rights of the Respondents.

XVII.

Petitioner, acting through its officers, agents and representatives, has made an effort in good faith to purchase and acquire title to the

real property described in Paragraph VI hereof, from the owners thereof, to wit: respondents named herein, but petitioner and said respondents have been unable to agree on a price or compensation for said tract of land.

XVIII.

The institution of these proceedings has been duly authorized by the Board of Directors of the Greensboro-High Point Airport Authority (Petitioner's Ex. C to Answer to Interrogatories No. 15).

Based upon the foregoing Findings of Fact, the Court makes the following

CONCLUSIONS OF LAW

I.

The allegations in petitioner's

petition and the proofs thereof by petitioner comply in all respects with the provisions of G.S. 40-12, et seq., as amended.

II.

The provisions of Chapter 40 of the General Statutes of North Carolina are not unconstitutional either under the provisions of the Constitution of the United States of America or the Constitution of North Carolina.

III.

The provisions of Chapter 40-10 of the General Statutes of North Carolina have no application to condemnation proceedings instututed by petitioner under the provisions of Chapter 40 of the

General Statutes of North Carolina, since petitioner derives its power to condemn from Section 7, Chapter 601, of the Session Laws of 1943.

IV.

No environmental impact statement is required, either under the laws of the United States or of the State of North Carolina, or under any rules or regulations issued in consequence thereof, for petitioner to acquire the tract of land which petitioner is endeavoring to acquire by condemnation in this proceeding.

V.

All objections and exceptions filed by respondents herein should be

overruled, except their objections and exceptions as to amount of just compensation as found by the Commissioners of Appraisal, which issue is for determination by a trial by jury as hereinafter set forth.

VI.

Petitioner, Greensboro-High Point Airport Authority, is entitled to condemn, acquire, and take said tract of land divested and barred of all right, title, interest, easements, and estate in said tract of land owned by Respondents upon the payment to Respondents of just compensation for said taking.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED and DECREED:

(1) That the exceptions made and taken by Respondents herein to the Findings of Fact and Conclusions of Law made by the Clerk of the Superior Court of Guilford County, and the Order predicated thereon entered by said Clerk, dated August 5, 1976, be and the same are overruled, and said Order is in all respects affirmed;

(2) That the exceptions made and taken by Respondents herein to the Findings of Fact and Conclusions of Law and the entry of the Judgment of Confirmation thereon made and entered by the Clerk of the Superior Court of Guilford County on the 28th day of February, 1977, be and the same are hereby overruled, and said Judgment of Confirmation is in all respects affirmed, SAVE and

EXCEPT insofar as said Judgment relates to the Respondents' exceptions to and appeal from the provisions thereof pertaining to the amount of just compensation to be paid to Respondents for the taking of the property described in ARTICLE VI of the Petition filed herein by petitioner, Greensboro-High Point Airport Authority, this Court, at this time, makes no determination in respect thereto, said issue of the amount just compensation being a matter for determination by a trial by jury;

(3) That by reason of Respondents exceptions made and taken to the amount of just compensation as set forth in said Judgment of Confirmation, and their appeal from the entry thereof, Respon-

dents are entitled to a trial by jury upon the issue of the amount of just compensation to be paid to Respondents by the Petitioner for the taking of the property which is the subject of this Proceeding, and this Proceeding is hereby retained solely for the trial of such issue;

(4) That Respondents are not entitled to a dismissal of this Proceeding by reason of any of the matters and things alleged in their respective answers or other pleadings filed herein, or by reason of any evidence contained in the Record of this Proceeding.

(5) That the costs of the action

be taxed against Petitioner.

This the 6th day of July, 1977.

s/ Hal H. Walker
Judge Presiding at the June 27, 1977, Civil Session, Superior Court of Guilford County, North Carolina.

APPENDIX D

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution
Amendment V.
U.S.C.A.Const. Amend. V.

Amendment V. Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process; Just Compensation For Property.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal

case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution
Amendment VII.
U.S.C.A.Const. Amend. VII.

Amendment VII. Civil Trials.

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

United States Constitution
Amendment XIV.
U.S.C.A.Const. Amend. XIV.

Amendment XIV. Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without

due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for

participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against

the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have

power to enforce, by appropriate legislation, the provisions of this article.

North Carolina Constitution

Article I

Sec. 19. Law of the land; equal protection of the laws.

No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin.

Sec. 25. Right of jury trial in civil cases.

In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and shall remain sacred and inviolable.

Article IV.

Sec. 13. Forms of action; rules of procedure.

(1) Forms of action.

There shall be in this State but one form of action for the enforcement or protection of private rights or the redress of private wrongs, which shall be denominated a civil action, and in which there shall be a right to have issues of fact tried before a jury. Every action prosecuted by the people of the State as a party against

a person charged with a public offense, for the punishment thereof, shall be termed a criminal action.

(2) Rules of procedure.

The Supreme Court shall have exclusive authority to make rules of procedure and practice for the Appellate Division. The General Assembly may make rules of procedure and practice for the Superior Court and District Court Divisions, and the General Assembly may delegate this authority to the Supreme Court. No rule of procedure or practice shall abridge substantive rights or abrogate or limit the right of trial by jury. If the General Assembly should delegate to the Supreme Court the rule making power, the General Assembly may, nevertheless, alter, amend, or repeal any rule of

procedure or practice adopted by the Supreme Court for the Superior Court or District Court Divisions.

United States Code

Title 28

§ 1257. State courts; appeal; certiorari.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

Title 42

§ 1982. Property rights of citizens.

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

Title 42

§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts.

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and

administered in accordance with the policies set forth in this chapter, and

(2) all agencies of the Federal Government shall--

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on--

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdicition by law or

special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

Title 49

§ 1716. Project applications for airport development.

Approval

(c)(3) No airport development

project may be approved by the Secretary unless he is satisfied that fair consideration has been given to the interest of communities in or near which the project may be located.

(4) It is declared to be national policy that airport development projects authorized pursuant to this subchapter shall provide for the protection and enhancement of the natural resources and the quality of environment of the Nation. In implementing this policy, the Secretary shall consult with the Secretaries of the Interior and Health, Education, and Welfare with regard to the effect that any project involving airport location, a major runway extension, or runway location may have on natural resources including, but

not limited to, fish and wildlife, natural, scenic, and recreation assets, water and air quality, and other factors affecting the environment, and shall authorize no such project found to have adverse effect unless the Secretary shall render a finding, in writing, following a full and complete review, which shall be a matter of public record, that no feasible and prudent alternative exists and that all possible steps have been taken to minimize such adverse effect.

Hearings

(d)(1) No airport development project involving the location of an airport, an airport runway, or a runway extension may be approved by the Secretary unless the public agency

sponsoring the project certifies to the Secretary that there has been afforded the opportunity for public hearings for the purpose of considering the economic, social, and environmental effects of the airport location and its consistency with the goals and objectives of such urban planning as has been carried out by the community.

(2) When hearings are held under paragraph (1) of this subsection, the project sponsor shall, when requested by the Secretary, submit a copy of the transcript to the Secretary.

Air and water quality

(e)(1) The Secretary shall not approve any project application for a project involving airport location, a

major runway extension, or runway location unless the Governor of the State in which such project may be located certifies in writing to the Secretary that there is reasonable assurance that the project will be located, designed, constructed, and operated so as to comply with applicable air and water quality standards. In any case where such standards have not been approved or where such standards have been promulgated by the Secretary of the Interior or the Secretary of Health, Education, and Welfare, certification shall be obtained from the appropriate Secretary. Notice of certification or of refusal to certify shall be provided within sixty days after the project application is received by the Secretary.

(2) The Secretary shall condition approval of any such project application on compliance during construction and operation with applicable air and water quality standards.

North Carolina General Statutes

Volume 2A

Chapter 40. Eminent Domain

§ 40-10. Dwelling houses and burial grounds cannot be condemned.

No such corporation shall be allowed to have condemned to its use, without the consent of the owner, his dwelling house, yard, kitchen, garden or burial ground, unless condemnation of such property is expressly authorized in its charter or by some provision of this Code.

Article 2.

Condemnation Proceedings.

§ 40-11. Proceedings when parties cannot agree.

If any corporation, enumerated in G.S. 40-2, possessing by law the right of eminent domain in this State, is unable to agree for the purchase of any real estate required for purposes of its incorporation or for the purposes specified in this Chapter, it shall have the right to acquire fee simple title to such real estate or an easement in such real estate in the manner and by the special proceedings herein prescribed.

§ 40-12. Petition filed; contains what; copy served.

For the purpose of acquiring such title the corporation, or the owner of

the land sought to be condemned, may present a petition to the clerk of the superior court of the county in which the real estate described in the petition is situtated, praying for the appointment of commissioners of appraisal. Such petition shall be signed and verified according to the rules and practice of such court; and if filed by the corporation it must contain a description of the real estate which the corporation seeks to acquire; and it must, in effect, state that the corporation is duly incorporated, and that it is its intention in good faith to conduct and carry on the public business authorized by its charter, stating in detail the nature of such public business, and the specific use of such land; that the land described in the petition is required for the purpose of conducting the

proposed business, and that the corporation has not been able to acquire title thereto, and the reason of such inability. The petition, whether filed by the corporation or the owner of the land, must also state the names and places of residence of the parties, so far as the same can by reasonable diligence be ascertained, who own or have, or claim to own or have, estates or interests in the said real estate; and if any such persons are infants, their ages, as near as may be, must be stated; and if any such persons are idiots or persons of unsound mind or are unknown, that fact must be stated, together with such other allegations and statements of liens or encumbrances on said real estate as the corporation or the owner may see fit to make. A summons as in other cases of special proceedings, together with

a copy of the petition, must be served on all persons whose interests are to be affected by the proceedings, at least 10 days prior to the hearing of the same by the court.

§ 40-17. Powers and duties of commissioners.

The commissioners, before entering upon the discharge of their duties, shall take and subscribe an oath that they will fairly and impartially appraise the lands mentioned in the petition. Any one of them may issue subpoenas, administer oaths to witnesses, and any two of them may adjourn the proceedings before them from time to time, in their discretion. Whenever they meet, except by the appointment of the court or pursuant to adjournment, they shall cause 10 days' notice of such meeting to be given to the parties who are to be affected by

their proceedings, or their attorney or agent. They shall view the premises described in the petition, hear the proofs and allegations of the parties, and reduce the testimony, if any is taken by them, to writing; and after the testimony is closed in each case, and without any unnecessary delay, and before proceeding to the examination of any other claim, a majority of them all being present and acting, shall ascertain and determine the compensation which ought justly to be made by the corporation to the party or parties owning or interested in the real estate appraised by them. They shall report the same to the court within 10 days.

§ 40-18. Form of commissioners' report.

When the commissioners shall have

assessed the damages, they shall forthwith make and subscribe a written report of their proceedings, in substance as follows:

To the Clerk of the Superior Court of.... ....County:

We,....., commissioners appointed by the court to assess the damages that have been and will be sustained by ....., the owner of certain land lying in the county of....., which the.....corporation proposes to condemn for its use, do hereby certify that we met on.....(or the day to which we were regularly adjourned), and, having first been duly sworn, we visited the premises of the owner, and after taking into full consideration the quality and quantity of the land aforesaid, the additional fencing likely

to be occasioned by the work of the corporation, and all other inconveniences likely to result to the owner, we have estimated and do assess the damages aforesaid at the sum of $.....

We have estimated the special benefits which the said owner will receive from the construction of said works to be the sum of $.....

Given under our hands, the..... day of....., A.D. 19....

Supreme Court, U. S.
FILED
JAN 3 1979
MICHAEL RODAK, JR., CLERK

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-894

PEARL TAYLOR IRVIN, CHARLES WATSON IRVIN, JR., and wife, MARY S. IRVIN, JOHN LAFAYETTE IRVIN and wife, NANCY B. IRVIN, DORIS IRVIN EGERTON and Husband, GEORGE G. EGERTON,

Petitioners,

v.

GREENSBORO-HIGH POINT AIRPORT AUTHORITY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NORTH CAROLINA COURT OF APPEALS

BRIEF FOR THE RESPONDENT IN OPPOSITION

Arthur O. Cooke
William Owen Cooke
P. O. Box 187
Greensboro, N. C. 27402
Counsel for Respondent

INDEX

Page

Table of Authorities ii

Introductory Note 1

Opinions Below 2

Jurisdiction 2

Statutes, Constitutional Provisions 2

Statement 3

Argument 3

I Necessity for Acquisition 4

II Alleged Failure to Comply with Statutory Requirements 5

III Denial of Trial by Jury on Issues of Necessity and "conditions precedent" 7

IV The Decision of the Appellate Court 8

Conclusion 9

TABLE OF AUTHORITIES

Statutes

28 U.S.C.A. Sec. 1257(3) 2

42 U.S.C.A. Sec. 4321 6

49 U.S.C.A. Sec. 1716(c) (3) (4) (d) (e) 6, 7

Chapter 40, General Statutes of North Carolina ... 3

Cases

Kaperonis v. Highway Commission, 260 N.C. 587, 133 S.E. 2d 464 (1963) 4

Board of Education v. Allen, 243 N.C. 520, 91 S.E. 2d 180 (1956) 4

In Re Housing Authority, 235 N.C. 463, 70 S.E. 2d 500 (1952) 4

Selma v. Nobles, 183 N.C. 322, 111 S.E. 543 (1922) 4

Power Co. v. Wissler, 160 N.C. 687, 133 S.E. 464 (1912) 4

Mount Olive v. Cowan, 235 N.C. 259, 69 S.E. 2d 529 (1952) 5

Town of Windsor v. Ronair, 329 F.Supp. 1286 (D.C. — N.Y. 1971) 6

City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E. 2d 179 (1972) 7

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-894

PEARL TAYLOR IRVIN, CHARLES WATSON IRVIN, JR., and wife, MARY S. IRVIN, JOHN LAFAYETTE IRVIN and wife, NANCY B. IRVIN, DORIS IRVIN EGERTON and Husband, GEORGE G. EGERTON,

Petitioners,

v.

GREENSBORO-HIGH POINT AIRPORT AUTHORITY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NORTH CAROLINA COURT OF APPEALS

BRIEF FOR THE RESPONDENT IN OPPOSITION

INTRODUCTORY NOTE

For purposes of clarity, we point out that in the condemnation proceeding brought by the Greensboro-High Point Airport Authority, as well as in the Findings of Fact, Conclusions of Law and Judgment of the Superior Court and in the opinion and judgment

of the North Carolina Court of Appeals, the Airport Authority (Respondent here) is designated as "Petitioner" and the land owners (Petitioners here) are designated as "Respondents." However, in order to conform to the designation appropriate to this Petition for Writ of Certiorari, the Airport Authority will be referred to in this Brief as the Respondent and the land owners as Petitioners. All italics in the text of this Brief are supplied unless otherwise noted. Page references to the Appendix to Petition are designated: (App. p. ——).

OPINIONS BELOW

The Findings of Fact, Conclusions of Law and Judgment of the Superior Court of Guilford County, North Carolina, appear at App. p. C-1 through C-33, inclusive. The opinion of the North Carolina Court of Appeals to which this Petition for Certiorari is directed is set forth at App. p.A-1 through A-36 inclusive. The judgment of the North Carolina Supreme Court dismissing the appeal and denying Petition for Discretionary Review appears at App. p. B-1 through B-3, inclusive.

JURISDICTION

The judgment of the North Carolina Supreme Court was entered 7 September 1978. The petition for certiorari was filed on December 5, 1978. Jurisdiction of this Court is invoked by Petitioners pursuant to 28 U.S.C.A. Sec. 1257(3).

STATUTES, CONSTITUTIONAL PROVISIONS

Petitioners have set forth numerous provisions of the United States and North Carolina constitutions, as well as provisions of the United States Code and North Carolina General Statutes, which they contend are involved in their petition. Respondent has nothing to add to those enumerated by Petitioners.

STATEMENT

On 1 July 1975, Greensboro-High Point Airport Authority (Respondent here) filed a condemnation proceeding pursuant to Chapter 40, General Statutes of the State of North Carolina, seeking to acquire fee simple title to a 90.35 acre tract owned by Petitioners for purposes of expansion of the Greensboro/High Point/Winston-Salem Regional Airport. The land owners (Petitioners here) interposed numerous procedural objections by challenging, *inter alia*, the necessity of the taking, the sufficiency of the effort to acquire the land by negotiations, the constitutionality of the taking, and denied in general all material allegations of the Authority's petition. In accordance with the prescribed statutory procedure, hearings were had, testimony was taken, exhibits filed and arguments presented. Thereupon, the Court made exhaustive Findings of Fact, set forth its Conclusions of Law and entered judgment overruling the objections asserted by the land owners. (App. p. C-1 through C-33, inclusive). On appeal to the North Carolina Court of Appeals, the judgment of the Superior Court was in all respects affirmed. (App. p. A-1 through A-36). Thereafter the North Carolina Supreme Court (1) dismissed the "Appeal as a Matter of Right" and (2) denied Discretionary Review. This placed the prceeding in a posture where the next step would be the trial by jury of the issue of the amount of just compensation due the land owners. However, Petitioners elected to petition this Court for a writ of certiorari upon the same grounds presented to and denied by the North Carolina Supreme Court.

ARGUMENT

Petitioners endeavor to present to this Court, as substantial constitutional questions: (1) the refusal of the Court to dismiss the proceeding on the grounds of "no

present necessity" for taking, (2) failure of Court to require the condemnor to comply with certain statutory conditions precedent to condemnation and (3) denying petitioners a jury trial on these issues. Their complaints, on the record before this Court, are without merit.

I

Necessity for Acquisition of Petitioners' Land

The question of necessity was the subject of substantial and conclusive proof by the Airport Authority. Testimony and exhibits disclosed a continually updated Master Plan for expansion of its facility which included Petitioners' property for use as a cargo handling area and related facilities (App. p. C-17). Specific Findings of Fact declare that public interest and public necessity required the Authority to acquire the lands in question "for the use and benefit of petitioner and the public." (App. p. C-21, 22, 23).

The law in respect to the constitutional aspects of the necessity of taking has been the subject of a conclusive judicial determination in connection with eminent domain proceedings. *Kaperonis v. Highway Commission*, 260 N.C. 587, 133 S.E. 2d 464 (1963). North Carolina courts have long held that a decision as to need or necessity is a legislative matter and not a subject for judicial inquiry and that it is conclusive upon the Court unless the property owner desiring to question the decision of need for a public purpose by the governing body *alleges* and proves bad faith, malice, wantonness or oppressive and manifest abuse of discretion by the condemnor. *Board of Education v. Allen*, 243 N.C. 520, 91 S.E. 2d, 180 (1956); *In Re Housing Authority*, 235 N.C. 463, 70 S.E. 2d, 500 (1952); *Selma v. Nobles*, 183 N.C. 322, 111 S.E. 543 (1922); *Power Co. v. Wissler*, 160 N.C. 687, 133 S.E. 464 (1912). Since Petitioners made no such allegations in their pleadings or attempted to offer any proof of this

nature, they were in no position to question the Authority's determination for need and the decision of the Court below was in accord with this rule.

Notwithstanding the rule set forth in the cases cited above, there was a substantial volume of evidence upon which the Trial Court predicated its Findings of Fact (App. p. C-21, 22, 23) that the taking of Petitioners' land was necessary, conceding that the word "necessary" means for use within a reasonable time. Respondent was required to prove, *and did prove*, that a determination had been made by the governing body of the Authority that Petitioners' property should be condemned for use in expansion of the airport, that the purpose for which it should be condemned was a public purpose and that the determination of the need and purpose was made in good faith. The burden of proof on this issue was met and the fact determined. This, in essence, is precisely what the Court of Appeals held on the question of necessity of taking.

II.

Alleged Failure to Comply with Statutory Requirements

The second point raised in the petition is so vague as to virtually justify no response. Petitioners apparently claim denial of due process because of failure to comply with certain statutes relating to negotiations prior to condemnation, the location of a "dwelling" house on the property condemned and environmental requirements. To begin with these are not constitutional questions at all. The matter of "negotiations" was fully treated by the Court below and the statutory mandate of the North Carolina act was found to have been fully met. The "dwelling house" issue involved a statutory interpretation (G.S. 40-10) and was summarily dismissed by the Court of Appeals (App. p. A-33, 34) by citing the applicable law as set forth in *Mount Olive v. Cowan*,

235 N.C. 259, 69 S.E. 2d 529 (1952). Lastly, under this point Petitioners claim they were denied due process in that Respondent failed to comply with the conditions precedent to this condemnation as the same are established by the National Environmental Policy Act of 1969, as amended, (42 U.S.C.A. Sec. 4321, et seq.) and Sections 1716 (c) (3) (4) (d) (e) of the Airport and Airways Development Act (49 U.S.C.A. Sec. 1701, et seq.). Whatever reasons Petitioners have for contending that this proceeding is unconstitutional because Respondent has not complied with certain conditions precedent invoked by the two Federal Statutes cited are nebulous and undefined. Petitioners mention these statutes and cite their provisions, without more. No authority is cited that these statutes prescribe constitutional conditions precedent to eminent domain proceedings.

Furthermore, there is no evidence of any type in the record that the provisions of the National Environment Policy Act of 1969 applied to the Respondent in this proceeding in any manner and, even if they do, there is no evidence that the appropriate agencies of the Federal Government did not and are not complying with its provisions. Indeed, a negative declaration was obtained through the Federal Aviation Administration.

Likewise, there is no evidence that the provisions of 49 U.S.C.A. Sec. 1716 (c) (3) (4) of the Airport and Airways Development Act are applicable to this proceeding and, if they are, there is no evidence that its provisions have not been complied with to the extent that they may be applicable. Even if there had been evidence that the provisions have not been complied with, this does not affect this proceeding or constitute a violation of petitioners' constitutional rights. *Town of Windsor v. Ronair*, 329 F. Supp. 1286 (D.C. — N.Y. 1971).

III.

Denial of Trial by Jury on Issues of Necessity and "the conditions precedent"

Finally, Petitioners claim a denial of due process by reason of the denial of a trial by jury on the issues of necessity and "the conditions precedent." Once again Petitioners vaguely suggest their constitutional rights are violated by reason of the judicial determination of the question of necessity. A review of the opinion of the Court of Appeals clearly demonstrates the lack of substance to this contention. Furthermore, a review of the only case cited by Petitioners in support of its position (*City of Charlotte v. McNeely*, 281 N.C. 684, 190 S.E. 2d 179 (1972)) discloses that it is direct and persuasive authority against the contention which they assert and stands for the proposition: "In any condemnation proceeding the question of what is a public purpose is one for the Court." In *McNeely* the landowners alleged "bad faith" and also alleged that the taking was pursuant to a "diabolical and reprehensible scheme" for which no public necessity existed. This question was determined by the Court and the proceeding dismissed.

The record before this Court establishes that the proceeding below was in total accord with long established principles of eminent domain, and particularly Chapter 40 of the General Statutes of North Carolina.

Petitioners conclude with a totally unsupported claim to "equal treatment" under the "Airport Act, 49 U.S.C.A. Sec. 1716(c) (3) (4) (d) (e) and National Environmental Policy Act of 1969." The record reflects adequate and complete compliance with NEPA by the acquisition through the Federal Aviation Administration of the required statement. The evidence is that this met the requirements imposed upon the FAA in approving Respondent's project. Petitioners at no time

undertook to challenge the sufficiency of the statement. Their sole citation of authority appears to flow from unsupported allegations contained in their answer to the original petition filed in this cause with these allegations being carried forward in their brief as "evidence" — in a vain attempt to bolster and patch up a record which is totally void of support for the contentions they now assert.

IV.

The Decision of the Appellate Court is Correct

Petitioners attack the decision of the North Carolina Court of Appeals as "questioning" the validity of the National Environmental Policy Act of 1969, as Amended, 42 U.S.C.A. Sec. 4332 (A) (C) and the Airport Act, 49 U.S.C.A. Sec. 1716(c) by failing to go out of its way to hold that Respondent was required to hold hearings, make environmental determinations and "otherwise comply" with these statutes before instituting condemnation proceedings. Contrary to Petitioners' broadside fusilade, the record clearly indicates that statutory compliance was met since such compliance was a pre-requisite to approval of the grant from the F.A.A. for the project which consisted solely of land acquisition. A review of the record and the opinion below reflects the fact that these questions were not carried forward as assignments of error on the appeal from the Trial Court and were belatedly attempted to be raised in the abortive "Appeal as a Matter of Right" (which was dismissed) and the "Petition for Discretionary Review" (which was denied) by the North Carolina Supreme Court.

CONCLUSION

There are no substantial constitutional questions involved in the Petition. The challenge of Petitioners is without merit. For the reasons above set forth, Respondent respectfully requests this Court for the entry of an order denying the Petition for a Writ of Certiorari.

Respectfully submitted,

ARTHUR O. COOKE
WILLIAM OWEN COOKE
P. O. Box 187
628 Jefferson Bldg.
Greensboro, North Carolina
27402